or of security, is, "Does the debt survive?"[5] Here the debt certainly survived at least five days, since by express agreement the defendant had five days to pay his "indebtedness". Had the defendant tendered the amount due before the land was sold, he would have expected and been entitled to a reconveyance.

The court, in holding that the deed was not security, perhaps proceeded upon the theory that, although strictly speaking the debt was not satisfied by the mere execution of the deed, nevertheless considering the very short period of time, it was practically taken in payment, and in that event ought not be included under section 726. It is true that this section, being a restriction upon the right of freedom of contract,[6] is to be narrowly construed; and this in fact has been the tendency of the courts.[7] But that the application of the code section would work hardship in a given case is merely a reflection upon the sound policy of that provision. Had the period in the present case been ten years instead of five days, there would not have been the slightest doubt that the deed was security. It is difficult to perceive how the time element can affect the essential nature of the transaction.

In the principal case, the holding of the court that the deed was not security did not prevent a sound result, because, as shown above, an exact determination of the nature of the deed was not essential to a proper decision. But if a similar case should arise in the future, and suit be brought before the land was sold—a situation clearly contemplated by section 726—then the reasoning of the principal case, that the deed was not security, would, if followed, prevent the court from applying section 726, and thus lead to a manifestly incorrect result. *B. F. R.*

MORTGAGES AND TRUST DEEDS: FUTURE ADVANCES: NOTICE.—Lawyers in this state for a generation have advised their clients that a properly recorded mortgage made in good faith to cover future advances is valid not only as between the immediate parties to the instrument, but as against subsequent purchasers or encumbrancers.[1] It was further laid down in the leading case[2] on this subject that the first mortgagee or other senior encumbrancer will be protected in making additional optional loans until he receives actual notice of advances made by intervening encumbrancers.

[5] Chapman v. Hicks, supra, n. 4; Holmes v. Warren (1904) 145 Cal. 457, 78 Pac. 954; Manasse v. Dinkelspiel (1886) 68 Cal. 404, 9 Pac. 547; Montgomery v. Spect, supra, n. 4; Hickox v. Low (1858) 10 Cal. 197. Cf. exhaustive note on this general subject in L. R. A. 1916B 18, especially §§ 151-161 thereof.

[6] Merced Bank v. Casaccia (1894) 103 Cal. 641, 37 Pac. 648.

[7] Cf. 3 California Law Review, 427.

[1] "The mortgage as against subsequent encumbrances becomes a lien for the whole sum advanced from the time of its execution and not for each separate amount advanced from the time of such advancements, although the right to enforce the collection thereof can only arise upon each advancement being made." Tapia v. Demartini (1888) 77 Cal. 383, 386, 19 Pac. 641, 643, 11 Am. St. Rep. 288.

[2] Supra, n. 1.

Constructive notice, by the recordation of subsequent liens, it was there stated, is not enough.[3] Tapia v. Demartini, in addition, is a precedent for the rules that if the mortgage discloses upon its face a provision for future advances the amount thereof need not be indicated, but that otherwise the amount of the liability must be expressly set forth. It is immaterial whether the advances are to be made in money or materials, and the agreement need not be in writing. That these doctrines are applicable to deeds of trust[4] given for security and to pledges[5] is now settled.

There is a marked distinction recognized, however, between advances which are optional with the mortgagee and those which are obligatory. In the latter case the first encumbrancer who is bound to advance loans to an agreed amount has priority to such figure even over later liens of which he has actual knowledge.[6] And a recent dictum protects the senior creditor if it is essential to his own security to complete the advances contemplated by the mortgage.[7]

With the law of future advances thus settled and developing consistently along the path marked out thirty-two years ago, certain language used in *Atkinson v. Foote*[8] must have come somewhat as a shock to the profession. The beneficiary under a senior deed of trust providing for optional future advances was held bound by constructive notice arising from the mere recordation of a deed to the purchaser at the sale under the junior trust deed. The court reasoned that since section 1213 of the Civil Code makes recordation of "every conveyance of real property" constructive notice to subsequent purchasers and mortgagees, additional advances thereafter made by the first lienor were secondary to the purchaser's interest. It does not appear, however, that the court was asked to consider section 1215 of the Civil Code which defines the term "conveyance" as used in section 1213 as "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered". It would seem logically to follow that if section 1213 cannot avail to defeat the California rule of future advances in the simple case involving encumbrances only, it should not operate to defeat the senior beneficiary's priority in a contest with a subsequent vendee.

Why the later purchaser with notice of an existing trust deed should have better rights than an encumbrancer under the same circumstances is not clear. While it is true that the second lien

[3] There is some support for the contrary view that each advance is a lien only from the date of recordation. See 1 Jones on Mortgages, § 373; 3 Pomeroy, Equity Jurisprudence (4th ed.) 1199; Ann. Cas. 1913C 557; 6 Virginia Law Review, 280 (January, 1920); 62 University of Pennsylvania Law Review, 556.

[4] Savings & Loan Soc. v. Burnett (1895) 106 Cal. 514, 533, 39 Pac. 922.

[5] Citizens' Sav. Bank of San Diego v. Mack (1919) 57 Cal. Dec. 387, 180 Pac. 618.

[6] Valley Lumber Co. v. Wright (1905) 2 Cal. App. 288, 84 Pac. 58, Ann. Cas. 1916B 637, note. Also, supra, n. 5.

[7] Supra, n. 5, p. 390.

[8] (Nov. 5, 1919) 30 Cal. App. Dec. 412.

ceases to exist after sale so far as the debtor is concerned, as to the senior beneficiary the buyer is simply the assignee of the trustees under the junior deed and gets no better rights than they had. In Poole v. Cage[9] it was said, "Any subsequent purchaser from a mortgagor must take notice of such contract or agreement as to future indebtedness and any advances made or indebtedness incurred in pursuance of such contract, whether before or after the subsequent sale or encumbrance, are protected by a prior and superior lien upon the property." It would thus appear to be immaterial that the mortgagor or trustor after sale no longer has a property interest to which the additional advance can attach.

In passing it is to be remarked that in the principal case the attorney for the first beneficiary had in fact actual knowledge of the existence of the second trust deed[10] and that as a matter of fact no future loans were made.[11] Nevertheless, the court's dictum is sufficiently pronounced to make the careful lawyer hesitate in advising his client to advance additional sums without searching the records. And this renders useless the protecting feature of Tapia v. Demartini.[12] It is to be hoped that the Supreme Court may soon have occasion to remove the doubt cast upon the California doctrine by the principal case. *J. J. P.*

MUNICIPAL CORPORATIONS: PUBLIC IMPROVEMENTS: RESOLUTION OF INTENTION: SCOPE OF CURATIVE PROVISIONS.—In *Watkinson v. Vaughn*,[1] the city of Richmond, in a proceeding under the "Improvement Act of 1911,"[2] passed a resolution of intention to levy a street assessment, which failed to state, as expressly required by the statute, in section 3, that the district assessed was the district to be benefited. The act contained the following clauses: Section 16. "... All objections not made in writing, and in the manner and at the time aforesaid, shall be waived, Provided the resolution of intention to do the work has been actually published and the notices of improvement posted as provided in this act." Section 66, after providing for the issue of bonds, declared that "such bonds by their issuance shall be conclusive evidence of the regularity of all proceedings thereto under this act." And section 82 declares that "No error . . . . which does not directly affect the jurisdiction of the city council . . . . shall avoid or invalidate such proceedings." In this case no objection was made as provided in the act. The exact question was, therefore, whether the defect was waived by the above "curative clauses."

The legislature could have waived this defect, since the only limit on its power to waive defects is that contained in the provisions

[9] (1919) 214 S. W. 500 (Tex. Civ. App.). Rehearing denied June 5, 1919.
[10] Supra, n. 8, at p. 421.
[11] Idem, at p. 420.
[12] Supra, n. 1.

[1] (Jan. 8, 1920) 59 Cal. Dec. 76, 186 Pac. 753, reversing 28 Cal. App. 657. Rehearing denied by the Supreme Court, Feb. 5, 1920.
[2] Cal. Stats. 1911, p. 730.